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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. PETER HOLDEN CLARK, Defendant and Appellant.	C061537 (Super. Ct. No. CM029571)

Defendant Peter Holden Clark pleaded no contest to felony driving while having a 0.08 percent or higher blood-alcohol level (Veh. Code, § 23152, subd. (b)--count 2) and admitted an allegation that he had five prior convictions for driving while under the influence of alcohol or drugs (DUI) or driving while having 0.08 percent or higher blood-alcohol level (*id.*, §§ 23550, 23550.5). In exchange, two related counts were dismissed. Defendant was sentenced to state prison for the upper term of three years, awarded 51 days of custody credit and 24 days of conduct credit pursuant to Penal Code section 4019 as

it then existed, and ordered to pay, among other things, a "$390 minimum fine" plus penalty assessments pursuant to Vehicle Code section 23550, subdivision (a).

Defendant timely appealed. While the appeal was pending, his appellate counsel twice asked the trial court to correct errors on the face of the abstract of judgment. In each instance, the clerk timely prepared a corrected[1] abstract of judgment. In each instance, the corrected abstract *reflected a base fine in excess of $390*.

On appeal, defendant contends (1) the recent amendment to Penal Code section 4019 entitles him to additional conduct credit, and (2) the trial court erroneously increased his fines after judgment had been entered and while the case was on appeal. We shall modify the judgment and direct the court to prepare an amended abstract of judgment.

FACTUAL BACKGROUND[2]

While driving in Oroville in August 2008, defendant struck the left rear sides of both another car and an ambulance while unsuccessfully attempting to pass each of them after a merge lane. Defendant told a California Highway Patrol officer that

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[1] On each document, the clerk checked the box for an "amended" abstract. However, neither document resulted from a change in the court's judgment. Thus, the documents are properly termed "corrected," rather than "amended."

[2] Because the matter was resolved by plea, our statement of facts is taken from the probation officer's report.

he thought he had struck only one vehicle after getting confused by the merge lane. While talking to defendant, the officer noticed that defendant had heavily slurred speech, had red and watery eyes, was unsteady and staggering, and had an odor of alcohol emitting from his breath. Defendant admitted to consuming "only a few beers" but failed a series of field sobriety tests. A blood draw showed that defendant had 0.31 percent alcohol content in his blood.

DISCUSSION

I

Defendant contends the recent amendments to Penal Code section 4019, effective January 25, 2010, entitle him to additional conduct credit. Specifically, he claims his award of 51 days of custody credit entitles him to 50 days of conduct credit. The point has merit.

The amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [Amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final."]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [applying *Estrada* to amendment involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(2), (c)(2); Stats. 2009,

3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served 51 days of presentence custody, is entitled to 50 days of conduct credit, as he contends, and we shall order the judgment modified.

II

Defendant contends the trial court erroneously changed its judgment by increasing his fines after his notice of appeal had deprived the court of subject matter jurisdiction.

The Attorney General counters that the clerk's corrections to the abstract of judgment do not reflect changes to the court's judgment and are merely clerical in nature.

We conclude the trial court did not attempt to, and did not in fact, change its pronounced judgment; however, neither corrected abstract accurately reflects the judgment that was pronounced. Because the court must prepare an amended abstract to reflect our modification of the judgment in part I, *ante*, the court will have an opportunity to properly set forth defendant's fine and penalty assessments for count 2.

Vehicle Code section 23550, subdivision (a) provides in relevant part: "If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of three or more separate violations . . . that resulted in convictions, that person shall be punished by . . . a fine of *not less than three hundred ninety dollars* (*$390*) nor more than one thousand dollars ($1,000). . . ." (Italics added.)

At sentencing on October 14, 2008, this exchange occurred:

"[THE COURT:] Now, Madam Clerk, you looked before on a prior case on a DUI, it's a $390 minimum fine with penalty assessments. What did that total?

"THE CLERK: $1,695.

"THE COURT: $1,695. That should include a security surcharge of $20 and the alcohol [abuse] education [penalty assessment] of $50 which is mentioned in the [probation] report. I would ask you again to lay out in the commitment to state prison the source and identity of each of the penalty assessments and ensure that there's no--that [defendant] is not hit twice on some of these fines."

Because Vehicle Code section 23550, subdivision (a) requires a fine of "not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000)," the trial court had *discretion* to impose a fine anywhere within that range.

"'"Rendition of judgment is an oral pronouncement."'" (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1075 (*Hong*).) At the sentencing hearing, the trial court never pronounced, or expressed any *intent* to pronounce, a *base* fine that exceeded the statutory minimum. Nor did defense counsel have any reason to voice opposition to an elevated base fine. The Attorney General's suggestion that the court imposed a *base* fine of $440 (first corrected abstract) or $460 (second corrected abstract)

overlooks the due process problem inherent in the court electing, following pronouncement of judgment, an amount that had not been pronounced and that defense counsel could not have known to address or oppose. We conclude the court in its discretion simply imposed "a $390 minimum fine with penalty assessments."

The trial court accepted the clerk's representation that, when the penalty assessments were added to the imposed "$390 minimum fine," the sum would be $1,695. This turned out not to be the case. As became apparent when appellate counsel sought correction of the abstract of judgment, a sum of $1,695 presupposes a base fine somewhat above the statutory minimum. The precise amount is not necessary to our discussion.

After defendant filed his notice of appeal, the trial court never convened on the issue of fines and penalty assessments and never purported to exercise its discretion anew to impose a fine that exceeded the statutory minimum. Nor could it lawfully have done so. (See, e.g., *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472-1473.)

Unlike the $1,695 sum, the $390 minimum base fine did not result from clerical error and thus was not subject to correction at any time by the trial court or a reviewing court. (See *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.) The Attorney General's argument overlooks this key distinction. Moreover, the court never issued a minute order purporting to

correct any clerical error in its *judgment*, as opposed to amending the *abstract of judgment*.

"'"The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms [citation] it cannot add to or modify the judgment which it purports to digest or summarize."'" (*Hong*, *supra*, 64 Cal.App.4th at p. 1075.)[3]

In this case, the trial court orally pronounced a $390 minimum fine for count 2 and never pronounced anything else. As noted, the court's spoken acknowledgment of the clerk's assertion that the fine plus penalty assessments would total $1,695 does not constitute an oral pronouncement of a greater fine.

Because the "'"abstract of judgment is not the judgment of conviction,"'" the two amended abstracts prepared by the clerk in response to appellate counsel's letters did not "'"add to or modify the judgment which [they] purport[ed] to digest or summarize."'" (*Hong*, *supra*, 64 Cal.App.4th at p. 1075.) Moreover, neither amended abstract properly digested or

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[3] Curiously, while defendant complains that the trial court "increased the base fine from $440 to $460," he does not similarly complain that the court "increased" the base fine from $390 to $440. For the reasons stated, we reject any contention that the court increased the base fine. Because the abstracts' failure to properly digest the judgment is clerical error correctable at any time, defendant's appellate argument does not forfeit his entitlement to an abstract reflecting a $390 base fine.

summarized the judgment. Neither contained either the $390 base fine or the assessment amounts that would derive from a $390 base fine.

Thus, the abstract of judgment must be corrected at item 8 to reflect a $50 alcohol abuse education and prevention penalty assessment (Veh. Code, § 23645, subd. (a)), the $390 base fine (*id.*, § 23550, subd. (a)), a $390 state penalty assessment (Pen. Code, § 1464, subd. (a)), a $270 county penalty assessment (Gov. Code, § 76000), a $195 state court construction penalty (*id.*, § 70372, subd. (a)), a $78 DNA penalty assessment (*id.*, §§ 76104.6, 76104.7), a $78 criminal surcharge (Pen. Code, § 1465.7), a $20 court security fee (*id.*, § 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373), and a $10 DMV fee, which totals $1,511 for count 2.

DISPOSITION

The judgment is modified to award defendant 50 days of conduct credit, for a total of 101 days of presentence credit. As so modified, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment listing a fine for count 2 composed of a $50 alcohol abuse education penalty assessment, a $390 base fine, a $390 state penalty assessment, a $270 county penalty assessment, a $195 state court construction penalty, a $78 DNA penalty assessment, a $78 criminal surcharge, a $20 court security fee, a $30 criminal conviction assessment, and a $10 DMV fee. The

trial court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.